

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NORTH DAKOTA  
SOUTHEASTERN DIVISION

UNITED STATES OF AMERICA, )  
                                ) Case No. 3:14-CR-18-1  
Plaintiff,                 )  
                                )  
v.                            ) Sentencing Memorandum  
                                )  
MICHAEL ANTWAIN MODISETT, )  
                                )  
Defendant.                 )

Defendant respectfully requests that the court consider the arguments below at the sentencing hearing in the above-captioned matter.

21 U.S.C. § 851 Enhancement

The government has only properly noticed one prior conviction for enhancement purposes. A person cannot be subject to an enhanced sentence by reason of prior convictions unless, before trial, the government files an information stating in writing the previous convictions to be relied upon. The government filed such an information. The government's Information to Establish Prior Convictions for Enhanced Sentence Pursuant to 21 U.S.C. § 851(a)(1) alleges a prior federal conviction from 2009 and a prior State of Minnesota conviction from 2003. Defendant concedes the existence of the 2009 federal conviction. However, Defendant has not been convicted of 3<sup>rd</sup> degree controlled substance crime. The government appears to concede this in its sentencing memorandum, in which it argues that defendant's 5<sup>th</sup> degree possession crime is a prior felony. 5<sup>th</sup> degree controlled substance crime may be a felony under Minnesota law, however, the government's information does not put defendant on notice of its intention to rely upon that conviction. Because defendant has not been convicted of 3<sup>rd</sup>

degree controlled substance crime only one prior conviction has been certified for the purposes of enhancement. With one prior conviction the defendant faces a mandatory minimum of 20 years. 21 U.S.C. 841(b)(1).

#### Obstruction of Justice

There are no facts in the record that support an obstruction of justice enhancement under §3C1.1. There is an allegation from an unidentified inmate that Mr. Modisett spoke of “visits” to individuals involved in his case. An investigation has been conducted, or is being conducted, but nothing substantiating the allegations of the unidentified inmate has surfaced. No audio or video of any conversation surfaced. No visits to any of the identified individuals occurred. Witnesses appeared at trial and no testimony was offered about intimidation or even communications with or on behalf of the defendant. It is absurd to think that Mr. Modisett could receive an adjustment to his guideline calculation based on unsubstantiated statements from an unidentified witness.

#### Acceptance of Responsibility Adjustment

Mr. Modisett should receive a two level downward adjustment for acceptance of responsibility. As noted in the previous version of the PSIR, Mr. Modisett accepted responsibility for his crime and plead guilty. It was only after being informed that he would receive no benefit from his plea that he elected to hold the government to its burden of proof. Mr. Modisett’s loss of this adjustment is the result of the same allegations that give rise to the obstruction of justice adjustment discussed above. Those allegations are unsubstantiated.

Dated: 11/10/2016

/s/Reid Brandborg  
Reid Brandborg  
Attorney for Defendant  
Atty. No. 06085

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NORTH DAKOTA  
SOUTHEASTERN DIVISION

UNITED STATES OF AMERICA, )  
                                ) Case No. 3:14-CR-18-1  
Plaintiff,                 )  
                                )  
v.                            ) Certificate of Service  
                                )  
MICHAEL ANTWAIN MODISETT, )  
                                )  
Defendant.                 )

I hereby certify that on November 10, 2016, the following documents:

Sentencing Memorandum

were filed electronically with the Clerk of Court through ECF, and that ECF will send a Notice of Electronic Filing (NEF) to the following:

Jennifer Klemetsrud Puhl jennifer.puhl@usdoj.gov, CaseView.ECF@usdoj.gov,  
michelle.meyer@usdoj.gov, tanya.abraham@usdoj.gov, usand.ecfcriminal@usdoj.gov,  
vicki.thompson@usdoj.gov

Brett M. Shasky brett.shasky@usdoj.gov, CaseView.ECF@usdoj.gov, deb.wilson@usdoj.gov,  
lori.daly@usdoj.gov, usand.ecfcriminal@usdoj.gov

I further certify that a copy of the foregoing documents will be mailed by first class mail, postage paid, to the following non-ECF participants:

None

Dated: 11/10/2016

/s/Reid Brandborg  
Reid Brandborg  
Attorney for Defendant  
Atty. No. 06085